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IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1986

MRS. CHERRY BERRY, GENERAL GUARDIAN FOR THE USE AND BENEFIT OF SANDY BERRY, CHRISTY BERRY, AND AMANDA BERRY, MINORS and MRS. CHERRY BERRY, INDIVIDUALLY AND FOR THE USE AND BENEFIT OF ALL ENTITLED

(PETITIONERS)

VERSUS

THE AETNA CASUALTY AND SURETY COMPANY

(RESPONDENT)

Petition for Writ of Certiorari to the United States Supreme Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

ounsel for Petitioner
oland C. Lewis
ost Office Box 1695
ackson, Mississippi 39215-1695
elephone: (601)969-2002

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1986

MRS. CHERRY BERRY,
GENERAL GUARDIAN FOR
THE USE AND BENEFIT OF
SANDY BERRY, CHRISTY BERRY,
AND AMANDA BERRY, MINORS
and MRS. CHERRY BERRY,
INDIVIDUALLY AND FOR
THE USE AND BENEFIT
OF ALL ENTITLED PETITIONERS

VERSUS NUMBER: _____

THE AETNA CASUALTY AND
SURETY COMPANY RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Mrs. Cherry Berry, individually and on behalf of others, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on April 10, 1986.

Questions Presented

Question 1: Whether the Fifth Circuit Court of Appeals committed manifest error in affirming the trial court's decision which strictly construed an insurance policy against an insured though expressly found to be ambiguous.

Question 2: Whether the Fifth Circuit Court of Appeals committed manifest error in failing to find that an individual named and added as a insured by endorsement to liability policy would become first class insured for purposes of uninsured motorist coverage under the Mississippi Uninsured Motorist statutes.

Question 3: Whether the Fifth Circuit Court of Appeals committed manifest error in affirming the decision of the trial court which denied the right to stack uninsured motorist coverage under Mississippi law and contrary to the the

clear edict of the Mississippi Supreme Court.

Parties

The parties in the Court below were the petitioner, Aetna Casualty and Surety Company, and Royal Globe Insurance Company. Royal Globe Insurance Company will have no further interest in this matter.

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Opinions Below

The court of appeals affirmed the decision of the federal district court without issuing an opinion. The decision is reported at 787 F.2d 586. The decision and order denying the petition for re-hearing en banc and for re-hearing has not yet been reported. The opinion of the federal district court is reported at 607 F. Supp. 397 (D.C. Miss. 1985).

Jurisdictional Statement

The judgment of the court of appeals was entered on April 10, 1986 and petitions for re-hearing en banc and for re-hearing were denied on May 29, 1986. The jurisdiction of this court is invoked under 28 USC §1254.

Statutory Provisions

The following statutory provisions are involved in this case:

1. Section 83-11-101, Miss. Code. Ann. (1972), as amended:

ARTICLE 3

UNINSURED MOTORIST COVERAGE

§83-11-101. Automobile liability policies to contain "uninsured motorist" and property damage provisions.

(1) No automobile liability insurance policy or contract shall be issued or delivered after January 1, 1967, unless it contains an endorsement or provisions undertaking to pay the insured all the sums which he shall be legally entitled to recover as damages for bodily injury or death from the owner or operator of an uninsured motor vehicle, within limits which shall be no less than those set forth in the Mississippi Motor Vehicle Safety Responsibility Law, as amended, under provisions approved by the commissioner of insurance: however, at the option of the insured, the uninsured motorist limits may be increased to limits not to exceed those provided in the policy of bodily injury liability insurance of the insured or such lesser limits as the insured elects to carry over the minimum requirement set forth by this section. The coverage herein required shall not be applicable where any

insured named in the policy shall reject the coverage in writing and provided further, that unless the named insured requests such coverage in writing, such coverage need not be provided in any renewal policy where the named insured had rejected the coverage in connection with a policy previously issued to him by the same insurer.

(2) No automobile liability insurance policy or contract shall be issued or delivered after January 1, 1980, unless it contains an endorsement or provisions undertaking to pay the insured all sums which he shall be legally entitled to recover as damages for property damage from the owner or operator of an uninsured motor vehicle, within limits which shall be no less than those set forth in the Mississippi Motor Vehicle Safety Responsibility Law, as amended, under provisions approved by the commissioner of insurance; however, at the option of the insured, the uninsured motorist limits may be increased to limits not to exceed those provided in the policy of property damage liability insurance of the insured or such lesser limits as the insured elects to carry over the minimum requirement set forth by this section. The coverage herein required shall not be applicable where any insured named in the policy

shall reject the coverage in writing and provided further, that unless the named insured requests such coverage in writing, such coverage need not be provided in any renewal policy where the named insured had rejected the coverage in connection with a policy previously issued to him by the same insurer.

The property damage provision may provide an exclusion for the first two hundred dollars ($200.00) of such property damage: however, the uninsured motorist provision need not insure any liability for property damage, for which loss the policyholder has been compensated by insurance or otherwise.

(3) The insured may reject the property damage liability insurance coverage required by subsection (2) and retain the bodily injury liability insurance coverage required by subsection (1), but if the insured rejects the bodily injury liability coverage he may not retain the property damage liability coverage. No insured may have property damage liability coverage under this section unless he also has bodily injury liability insurance coverage under this section.

2. Section 83-11-103(b), Mississippi Code Ann. (1972), as amended:

§83-11-103. Definitions.

(b) The term "insured" shall mean the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either, while in a motor vehicle or otherwise, and any person who uses, with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies, and a guest in such motor vehicle to which the policy applies, or the personal representative of any of the above. The definition of the term "insured" given in this section shall apply only to the uninsured motorist portion of the policy.

3. Section 63-15-3(j), Mississippi Code Ann. (1972), as amended:

§63-15-3. Definitions.

The following words and phrases, when used in this chapter, shall, for the purpose of this chapter, have the meanings respectively ascribed to them in this section, except in those instances where the context clearly indicates a different meaning:

(j) "Proof of financial responsibility" means proof of ability to respond in damages for liability, on account of accidents occurring subsequent to

the effective date of said proof, arising out of the ownership, maintenance or use of a motor vehicle, in the amount of ten thousand dollars ($10,000.00) because of bodily injury to or death of one (1) persons in any one (1) accident, and subject to said limit for one (1) person, in the amount of twenty thousand dollars ($20,000.00) because of bodily injury to or death of two (2) or more persons in any one (1) accident, and in the amount of five thousand dollars ($5,000.00) because of injury to or destruction of property of others in any one (1) accident.

Statement of the Case

H. H. (Jack) Berry was killed, and his wife, Cherry Berry, was injured in a car wreck caused by the negligence of an uninsured motorist.[1] Complaints were filed in federal district court pursuant to 28 U.S.C. §1332 seeking uninsured motorist benefits against Aetna, the

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[1] Berry v. Aetna Cas. & Sur. Co., 607 F. Supp. 397 (D.C. Miss. 1985).

insurer of Jack Berry's business, Berry Pontiac-GMC, Inc. Mr. Berry was riding in a vehicle owned by General Motors Corporation at the time of the collision and insured by Royal Globe. No issue is made as to that insurance company.

Aetna issued a policy which on the declarations page listed Berry Pontiac-GMC, Inc., as the named insured. The declarations page states that $25,000.00 uninsured motorist coverage is included for all owned cars, for which separate advanced premiums, based on the estimated number of cars, were charged. The declarations page refers to and incorporates endorsement CA9910.[2]

Endorsement CA9910 provided in bold type that it was "DRIVE OTHER CAR COVERAGE - BROADENED COVERAGE FOR NAMED

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[2] Id. at 398. Record p.176.

INDIVIDUALS". The individual named in this endorsement is Mr. Berry. In small print, the endorsement stated that coverages were being changed as shown by premium charges made in a series of boxes on the endorsement. Separate premiums are listed on the endorsement in the box for liability coverage and in the box for automobile med-pay. In each case, after the premium charge is the abbreviation "incl" apparently noting an abbreviation for included. The box captioned "premium uninsured motorist" was left blank by Aetna. In the paragraph following the series of boxes was paragraphs A2 and B. Paragraph A2 of the endorsement changes the liability insurance to include Jack Berry and his family as insureds. This coverage extended to Berry in driving automobiles not owned by him and in regard to purely

personal pursuits.[3]

Paragraph B of the endorsement stated as follows:

> "CHANGES IN AUTOMOBILE MEDICAL PAYMENTS AND UNINSURED MOTORIST INSURANCE.
>
> The following is added to WHO IS INSURED. Any individual named in this endorsement and, while resident in the same household, his or her spouse and the family members of either are **insureds** while **occupying** or while a pedestrian when being struck by any **auto you** don't own...." [Emphasis in original.][4]

Jack Berry did not execute any written rejection of uninsured motorist coverage.[5] The only definitions of uninsured motorist coverage in the policy, as it was delivered to Jack Berry and Berry Pontiac, are contained

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[3]Record, p. 185.

[4]Id. at 185.

[5]607 F. Supp. at 398.

in the endorsement adding Berry.[6]

In January of 1982, Aetna answered admitting that Cherry Berry and Jack Berry were insureds under it's policy, but contended that their liability was limited to $25,000.00 per accident limit.[7] Aetna filed an amended answer admitting that the Berrys were insured for some purposes, but denying any uninsured motorist coverage. Aetna has never asserted in pleadings that the limits, if applicable, would be less than $25,000.00.[8]

On cross motions for summary judgment, the Berrys contended they were named insureds and entitled to stack coverages. The defendant, Aetna, contended that the

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[6]Record, p. 169-186

[7]Id. at 54-5.

[8]Id.

Berrys were provided with no uninsured motorist coverage. The trial court found the Berrys to be insured, under the endorsement only, and only for $10,000.00. The Fifth Circuit Court of Appeals affirmed.

REASONS FOR GRANTING WRIT

Introduction

In this case, centuries old black letter hornbook law on construing contracts against the draftsman has been ignored. A contract for insurance has been ripped into two parts, though doing so renders a portion meaningless. The contract was expressly found to be ambiguous as to coverage, but was nevertheless strictly construed against an insured and in favor of the drafting insurance company to reduce the appli-

cable limits.

It is the law of the state of Mississippi where separate premiums are charged for uninsured motorist coverage for a named insured, the policy limits stack by the number of vehicles insured, regardless of any attempted limiting language in the policy.[9] That is the law. In this case, the contract contained no attempted limitations, yet stacking was not applied.

A successful business man died, and his wife was injured. There is no substantial dispute as to any of the facts. Instead of a recovery of up to $775,000.00, the plaintiffs were awarded $10,000.00 for both the death and the personal injury, though the statutory

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[9]Government Emp. Ins. Co. v. Brown, 446 So. 2d 1002, (Miss. 1984)

minimum coverages of the state of Mississippi are $10,000.00/$20,000.00.[10]

The decisions in this case represent an extreme and radical departure from the most basic tenets of contract construction. It can be reconciled with neither the statutory law of the state of Mississippi, nor its clear well enunciated public policy in regard to uninsured motorist coverage. The law which the petitioner was entitled to have applied in her case, just as it should be applied in every case, has not been applied. A very real and substantial injustice has resulted which should be remedied.

Question I.

Three egregious errors were made by the trial court and silently affirmed by

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[10] §83-11-101, Miss. Code Ann. (1972) as amended. §63-15-3, Miss. Code Ann. (1972) as amended.

the Fifth Circuit Court of Appeals. An endorsement, which was a part of and expressly incorporated into the main body of the policy, was treated as a contract separate and apart from the main policy. Secondly, though expressly finding that the endorsement was ambiguous as to whether uninsured motorist coverage had been triggered, the trial court strictly construed the policy to deny the policy limits stated on the declaration sheet of the policy. The court, thirdly, though dealing with a case in which there were injuries to two (2) persons, found coverage and applied a $10,000.00 limit, though the applicable Mississippi statutes would mandate a minimum of $10,000.00/$20,000.00 coverage.[11]

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[11] Id.

The trial court, in considering whether Jack Berry was insured and entitled to stack coverages under the Aetna policy found:

1. Item 1 on the Declarations lists Berry Pontiac-GMC, Inc., as the named insured therefore Jack Berry was not a named or first class insured.

2. Jack Berry was not occupying a Berry Pontiac car, so he was not a second class insured either.

The trial court then considered the endorsement separately finding:

1. That Jack Berry was the named insured.

2. That no premium was noted for uninsured motorist coverage on the endorsement.

3. That the endorsement changed the policy definitions for uninsured motorist coverage.

4. That the endorsement was ambiguous as to whether a separate premium was required to trigger the uninsured motorist coverage.

5. That given that ambiguity and the mandatory coverage

> required by the Mississippi Uninsured Motorist statute that the Berrys were only entitled to $10,000.00 total coverage.

The trial court never referred back to the main body of the policy which clearly revealed $25,000.00 policy limits, nor did the court consider the fact that as a named insured the Berrys were entitled to stack their coverages.

In this case as the trial court expressly found, an ambiguity arose since uninsured motorist coverage was not expressly "conditioned on the payment of an uninsured motorist coverage premiums."[12] But finding that coverage was triggered, the court allowed one half of the statutory minimums instead of the policy limits stated in Aetna's document.

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[12]607 F. Supp. at 398.

This court, as virtually all courts have, has repeatedly held that where language in a contract is subject to two interpretations, that interpretation which is more favorable to the insured must be interpreted. In the case of London Assurance v. Companhia De Moagens Do Barreiro[13] stated:

> If a company, by the use of the expression found in a policy, leaves it a matter of doubt as to the true construction to be given the language, the court should lean against the construction which would limit the liability of the company.

In the case of Imperial Fire Insurance Company of London v. Koos County,[14] while finding that the contract in issue there was not ambiguous by its term, this court stated:

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[13] 167 U.S. 149, 17 S. Ct. 785, 789, 42 L. Ed. 113 (1897).

[14] 151 U.S. 452, 14 S. Ct. 379, 381, 38 L. Ed. 231 (1894).

> It is settled, as laid down by this court in Thompson v. Insurance Co., 136 U.S. 287, 10 Sup. Ct. 1019, that, when an insurance contract is so drawn as to be ambiguous, or to require interpretation, or to be fairly susceptible of two different constructions, so that reasonably intelligent men, on reading the contract, would honestly differ as to the meaning thereof, that construction will be adopted which is mostly favorable to the insured.

In this case, the trial court construed the two segments of a contract as if they were separate contracts. While this may be one possible construction, it certainly cannot be said that it is unreasonable to construe the endorsement, having once found that coverage is triggered, to trigger the policy limits of $25,000.00 per accident.

The most telling indicator in this case of the ambiguity of a contract and the proper construction of a contract as to what the policy sets forth as its

uninsured motorist coverages is the conduct of Aetna during the course of this litigation. In their original answer in January of 1982, Aetna admitted that both Jack and Cherry Berry were insureds under its policy without contending that there was no uninsured motorist coverage.[15] Aetna's defense was basically limited to their assertion that their liability was limited to the $25,000.00 per accident limit in opposition to the petitioner's claim that she was entitled to stack coverages. On February 8, 1984, the Mississippi Supreme Court, acting on a certified question from the Fifth Circuit Court of Appeals,[16] destroyed the defense asserted by Aetna by holding:

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[15]Record, 54-5.

[16]Government Emp. Ins. Co. v. Brown, 675 F.2d 645 (5th Cir. 1982)

> Any language attempting to limit an insurers liability must fail when it deprives the insureds of benefits for which a premium was paid. We now adopt the reasoning set forth in Justice Broom's dissent in the Talbot case and apply the theory that recovery cannot be limited by an insurer for benefits for which a premium is paid by an insured, notwithstanding clear and unambiguous language of an attempted limitation by the insurer.[17]

Their defense as to the stacking issue having been obliterated, and given their previous admission of Jack Berry's status as an insured, Aetna filed an amended Answer on October 31, 1984.[18] Aetna then seized upon their failure to note a separate premium on the endorsement for uninsured motorist coverage and then began asserting that Jack and

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[17] Government Emp. Ins. Co. v. Brown, 446 So. 2d 1002, 1006 (Miss. 1984)

[18] Record, 597-601

Cherry Berry were not insureds for the purposes of uninsured motorist coverage. As previously stated, this is at best creating an ambiguity which certainly cannot be used for denying coverage.

Aetna, itself, has continuously through the litigation construed the policy to provide $25,000.00 coverage. Aetna, in its pleadings, asserted that the limits, if applicable would be $25,000.00. While the law clearly does not support Aetna's continued assertions that stacking is not applicable, Aetna and the petitioner, if not the trial court, understands that the contract does provide for policy limits of $25,000.00.

Question 2.

While the trial court's decision was manifestly erroneous for multiple reasons, it directly conflicts with the

Mississippi uninsured motorist mandatory coverage and, at least by analogy, with the holding of the Fifth Circuit Court of Appeals in Allstate Ins. Co. v. Randall[19] and other decisions, both of that court and the Mississippi Supreme Court.

The trial court's decision denied policy coverages to a "named insured" who was killed by an uninsured motorist. When Aetna by endorsement made Jack Berry a "named insured" under the liability provisions of its policy, he by statutory definition, regardless of any attempted exclusions or ambiguities became an "insured" and a first class insured for uninsured motorist purposes pursuant to the Mississippi statutes.

Section 83-11-101(1) mandates:

> No automobile liability insurance policy or contract shall be issued or delivered

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[19]753 F. 2d 441 (5th Cir. 1985)

> unless it contains an endorsement or provisions undertaking to pay the insured all sums which he shall be legally entitled to recover as damages for bodily injury or death from the owner or operator of an uninsured motor vehicle.... The coverage herein required shall not be applicable where any insured named in the policy shall reject the coverage in writing.

Here there was no rejection. Is Jack Berry an "insured" under the statute? Yes. The statute defines "insured" in pertinent part:

> [I]nsured shall mean the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either while in a motor vehicle or otherwise.[20]

Neither the statute nor in case law has "named insured" as used in the statute been expressly defined, perhaps because it is so elementary. The sta-

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[20] §83-11-103, Miss. Code Ann. (1972) as amended.

tute must be defining insured for the purposes of uninsured motorist coverage by reference to the liability provisions of the policy. In Aetna's liability provisions there were two named insureds: Berry-Pontiac, which was specifically denominated as such by the policy and Jack Berry who was not only "insured" under the liability provisions for the accident in which he died, but also specifically "named". Automatically, by operation of law, the act of adding him as a named individual to the liability policy, made him an "insured" under the uninsured motorist provisions.

The Fifth Circuit Court of Appeals and the Mississippi Supreme Court have up until the instant case, when looking at the question of whether an individual is covered and the extent of the coverage, employed the rationale that the mandated

cov - ge may not be limited, nor the statutory definitions of "insured" altered or limited in any way by any policy provision.[21]

In Lowery v. State Farm Mutual Automobile Ins. Co.,[22] the insurance policy purported to exclude coverage where an insured was in an owned but uninsured vehicle at the time of the accident. The policy attempted to re-define the definition of insured to exclude the named insured's son. The provision was voided by the Mississippi court.

The court stated that the purpose of the uninsured motorist act was:

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[21] Lowery v. State Farm Mutual Auto. Ins. Co., 285 So. 2d 767 (Miss. 1974); Preferred Risk Mutual Ins. Co. v. Poole, 411 F. Supp. 429 (D.C. Miss. 1976); State Farm Mutual Auto. Ins. Co. v. Nester, 459 So. 2d 787 (Miss. 1984).

[22] 285 So. 2d 767 (Miss. 1974).

> [T]o give the same protection to the person injured by an uninsured motorist as he would have had if he had been injured in an accident caused by an automobile covered by a standard liability policy. Such provisions are to be liberally construed to accomplish such purpose.[23]

The Lowery court specifically noted that Lowery, [like Berry], fell under the statutory definition for first class insureds. Therefore, any attempt to limit or re-define the coverage was void. In the present case Aetna, having accepted premiums on the endorsement which made Jack Berry a named insured under the liability provision and therefore a first class insured under the statute has argued, successfully thus far, that Aetna's failure to note the collection of a premium for uninsured motorist coverage on the endorsement

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[23] 286 So. 2d at 771, quoting from Rampy v. State Farm Mutual Auto. Ins. Co., 278 So. 2d at 428 at 432, (Miss. 1973).

effectively re-defines insured to the exclude Jack Berry from coverage under the body of the policy. Clearly if Aetna could not alter his coverage by express provision a fortiori it cannot be limited by the absence of such a notation, particularly where the policy clearly did collect separate premiums for uninsured motorist coverage.

In State Farm Mut. Auto Ins. Co. v. Nester,[24] State Farm appealed from a judgment finding and aggregating coverage for the daughter of a named insured. Nester was injured in a car wreck while her automobile was being driven by another individual. The State Farm policy forbid Nester from making a liability claim against her driver as a permissive user. The policy further

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[24] 459 So. 2d 787 (Miss. 1984).

provided that an insured vehicle under the policy could not be an uninsured vehicle and therefore, State Farm had denied coverage under the uninsured motorist provisions. The court stated:

> Because the legislature has directed that our state's motorist be so protected, every automobile liability insurance policy... has also de jure provided uninsured coverage of at least the statutory minimum, unless the insured expressly rejected that coverage. Any attempt to contractually limit an insureds duty of coverage is necessarily confined to the boundaries of the statute and may not be effective to narrow the requirements of the statute. (Emphasis added.)[25]

It is reiterated that under the decisions of the Mississippi court in factually varying circumstances that the uninsured motorist statute was to be liberally construed to provide coverage

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[25] Id. at 789.

and exceptions from coverage were to be strictly construed. Further, in determining whether coverage was available that the matter was to be viewed from the perspective of the injured insured. The court quoted with approval from Insurance Law and Practice[26] by Appleman, which shows the rationale underlying the decision:

> It has properly been stated that uninsured motorist protection is not coverage for vehicles but for persons, even though it is contained within a policy otherwise insuring an automobile and that it would be unconscionable to permit an insured to collect premiums on the one hand and remove protection with the other by redefining 'insured' under the uninsured motorist coverages.[27]

The Fifth Circuit Court of Appeals only recently in Allstate Insurance Co.

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[26]Appleman, Insurance Law and Practice §50080.

[27]459 So. 2d at 793.

v. Randall,[28] held that an attempted limitation of coverage and exclusions were not only ineffective as to the minimum coverages mandated by statute, but further found that the exclusion could not be applied as to coverage in excess of the minimum. In that case, Randall was injured in an automobile accident while a passenger in a car owned by her father and driven by her brother. Her liability claim was denied based on a household exclusion and Allstate likewise denied coverage under the uninsured motorist provision. The trial court there had voided the provision restricting uninsured motorist coverage but only in the minimum amount of $10,000.00. The Fifth Circuit in that case held that the full stacked

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[28]753 F. 2d 441 (5th Cir. 1985)

policy limits applied, but failed to apply the same principles to this case.

In the case of Lambert v. Liberty Mutual Insurance Co.,[29] it is clearly stated why Jack Berry by force of law is a first class named insured.

> In State Farm Automobile Ins. Co. v. Reaves, 292 Ala. 218, 292 So. 2d 95 (1974), we construed our uninsured motorist statute as mandating uninsured motorist coverage for all 'persons insured thereunder' under the automobile liability policy. We held that because a brother and a mother of a policy holder were 'insureds' under the omnibus clause of the liability policy, they must also be covered under the uninsured motorist provision and therefore they would not fall under an 'exclusion' for injuries suffered while occupying a vehicle owned by the 'named insured' or any member of the same household not covered under the policy.[30]

Question 3.

Clearly by the endorsement to the

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[29]331 So. 2d 260 (Ala. 1976)

[30]Id. at 265.

policy, Jack Berry was named as an insured under the Aetna policy. The Aetna policy shows premiums for eight (8) plates were collected as an advance premium for uninsured motorist coverage. The policy further provides as the trial court found that the policy covered all owned automobiles. The affidavit of Cherry Berry established that thirty-one (31) automobiles were owned by the dealership on the date of Jack Berry's death.[31] In the case of Government Emp. Ins. Co. v. Brown,[32] the Mississippi Supreme Court was confronted with a policy which on its declaration sheet charged separate premiums for uninsured motorist coverage. The policy also included language which purported to

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[31]Record, p. 332-3.

[32]446 So. 2d 1002 (Miss. 1984).

limit coverage to a single policy limit and to prohibit stacking. The Mississippi Supreme Court found that the conflict between the declaration sheet and the words of limitations was in itself ambiguous but further went on to hold that even if no ambiguity existed that the public policy of the State of Mississippi would not tolerate such a limitation on liability where separate premiums were charged.

In the present case, the only language in the policy which in any form or manner defines or addresses uninsured motorist coverage is found in endorsement CA9910[33]. This endorsement contains no language which even attempts to prevent stacking. Jack Berry was "named" in the policy by an endorsement and by

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[33]Record, p.69-86.

that endorsement he was "insured". Under the clear dictate of Mississippi law, he is entitled to stack the policy limits of $25,000.00 by the number of owned vehicles.

Since premiums were paid on behalf of Jack Berry, and he was specifically intended and named beneficiary of the contract, there can be no question he is entitled to stack coverage on all owned automobiles.

Conclusion

The trial court in its reasoning erected an impermeable barrier between a policy and an endorsement to that policy, treating each as a separate and independent contract with the result that there was a strict construction of one ambiguous contract against an insured. In this, the trial court committed manifest error. The trial court failed to

recognize that by operation of the uninsured motorist statute of the state of Mississippi, the "naming" and "insuring" of Jack Berry, by the endorsement, for liability purposes, insured him under the policy's terms for uninsured motorist coverage. In this, the trial court committed manifest error. The trial court in the face of the clearest possible mandate that the law of Mississippi required stacking, refused to stack coverages. In this, the trial court committed manifest error. Though the parties to the litigation disagreed as to the applicability of uninsured motorist coverage and on the issue of stacking, the parties agreed that the terms of the policy provided for $25,000.00 uninsured motorist coverage. The court ignored this agreement and the positions of the parties and further

failed to follow and apply even the statutory minimum coverages which it purported to apply. In this, the trial court committed manifest error.

The Fifth Circuit Court of Appeals affirmed the decision without opinion. They compounded the multiple errors made by the trial court, and provided no reason nor argument in support of their position or in support of the trial court's opinion, because indeed the decision is insupportable on the facts, on the law, in logic and in equity. The petitioner respectfully requests that these manifest errors be corrected and that the court issue a petition for writ of certorari for the review of this case to the Fifth Circuit Court of Appeals.

RESPECTFULLY SUBMITTED, this the 27th day of August, 1986.

MRS. CHERRY BERRY,
GENERAL GUARDIAN FOR
THE USE AND BENEFIT OF
SANDY BERRY, CHRISTY BERRY,

AND AMANDA BERRY, MINORS,
and MRS. CHERRY BERRY,
INDIVIDUALLY AND FOR
THE USE AND BENEFIT
OF ALL ENTITLED PETITIONERS

BY: Original Signed
by ROLAND C. LEWIS
OF COUNSEL FOR PETITIONER

ROLAND C. LEWIS
Attorney at Law
Post Office Box 1695
Jackson, Mississippi 39215-1695
Telephone: (601) 969-2002

AFFIDAVIT OF SERVICE

STATE OF MISSISSIPPI

COUNTY OF HINDS

PERSONALLY APPEARED BEFORE ME, the undersigned authority in and for the above County and State, ROLAND C. LEWIS, who, after being by me first duly sworn, states on his oath that he is a member of a bar of the Supreme Court of the

United States of America, and that the above and foregoing **Petition for Writ of Certiorari**, was deposited with the United States Post Office, Jackson, Mississippi, on the 27th day of August, 1986, and that copies thereof were served upon the following counsel of record:

Robert T. Gordon, Esq.
Heidelberg, Woodliff and Franks
Suite 1400
Capital Towers Building
Jackson, Mississippi 39201

Jim Bullock, Esq.
Shell, Buford, Bufkin,
Callicutt & Perry
Post Office Box 157
Jackson, Mississippi 39205

Jim Kitchens, Esq.
Constance Johnson, Esq.
Kitchens and Pickard
Post Office Box 310
Hazlehurst, Mississippi 39083

Affiant further states that the mailing took place as to his own personal knowledge on said date.

Roland Lewis
ROLAND C. LEWIS

SWORN TO AND SUBSCRIBED BEFORE ME, this the 27th day of August, 1986.

Marsha Dear Lewis
NOTARY PUBLIC

My Commission Expires:

April 8, 1987

ROLAND C. LEWIS
ATTORNEY AT LAW
POST OFFICE BOX 1695
JACKSON, MISSISSIPPI 39215-1695
TELEPHONE: (601)969-2002

A P P E N D I X

NO OPINION WAS RENDERED
BY THE
FIFTH CIRCUIT COURT OF APPEALS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION
CIVIL ACTION NUMBER: J81-0553(L)

MRS. CHERRY BERRY, GENERAL GUARDIAN
FOR THE USE AND BENEFIT OF
SANDY BERRY, CHRISTY BERRY,
AND AMANDA BERRY, MINORS, AND
MRS. CHERRY BERRY, INDIVIDUALLY
AND FOR THE USE AND BENEFIT OF
ALL ENTITLED PLAINTIFFS

V.

THE AETNA CASUALTY AND SURETY COMPANY
and ROYAL GLOBE INSURANCE
COMPANY DEFENDANTS

CONSOLIDATED WITH

CHERRY BERRY, ET AL PLAINTIFF

V. CIVIL ACTION NUMBER J81-0554(L)

AETNA CASUALTY AND SURETY COMPANY
and ROYAL GLOBE INSURANCE
COMPANY DEFENDANTS

CONSOLIDATED WITH

CHERRY BERRY, et al PLAINTIFF

V. CIVIL ACTION NUMBER J81-0555(L)

AETNA CASUALTY AND SURETY COMPANY
and ROYAL GLOBE INSURANCE
COMPANY DEFENDANTS

MEMORANDUM OPINION

On November 14, 1981, H. H. (Jack) Berry sustained fatal injuries in an

accident allegedly caused by the negligence of an uninsured motorist. Berry, president and stockholder of Berry-Pontiac-GMC, Inc. (Berry-Pontiac), was a passenger in an automobile driven by his wife and owned by GMAC, Pontiac Motor Division (GMAC). Mrs. Berry, individually and as guardian of her minor children, brought this action against Royal Globe Insurance Company (Royal Globe) and Aetna Casualty and Surety Company (Aetna). Royal Globe had issued an insurance policy providing uninsured motorist coverage for certain automobiles owned by GMAC, the named insured. On previous motion for summary judgment, this court determined that the Mississippi Uninsured Motorist Act, Miss. Code Ann. 83-11-103(b) (Supp. 1984), provides for two classes of insureds, the first class including:

> "The named insured and, while residents of the same household, the spouse of any such named insured and relatives of either, while in a motor vehicle and otherwise"

and the second class consisting of:

> "any person who uses, with the consent, express or implied, of the named insured, the motor vehicle to which the policy applies, and a guest in such motor vehicle to which the policy applies, or the personal representative of any of the above."

The court concluded that aggregation of coverage was only available to first class insureds, which class under the Royal Glove policy only included GMAC, a corporate entity. Jack Berry, being a second class insured, was not entitled to stack coverage.

The issue before the court now concerns the extent of coverage, if any, provided to Jack Berry by the Aetna policy while he was a passenger in an automobile not owned by Berry-Pontiac.

The declaration page of the Aetna policy reflects that the named insured is Berry-Pontiac-GMC, Inc., a corporation. Uninsured motorist coverage, in the amount of $25,000 per accident, is provided, according to the covered automobile designation symbol, for owned automobiles only. Item three of the policy elaborates:

> OWNED AUTOS ONLY. Only those autos You own (and for Liability Coverage any trailers you don't own while attached to power units you own). This includes autos you acquire ownership of after the policy begins.

Jack Berry is not a first class insured under the provisions of the declaration page since the named insured is a corporation, Berry-Pontiac-GMC, Inc. Neither is he a second class insured because he was not riding in a "motor vehicle to which the policy applies." See Miss. Code Ann. 83-11-103(b) (Supp. 1984).

Attached to the policy is an endorsement providing "drive other car coverage - broadened coverage for named individuals." The endorsement changes the uninsured motorist coverage by adding to "who is insured":

> Any individual named in this endorsement [Mr. Berry] and, while a resident in the same household, his or her spouse and the family members of either are insureds while occupying or while a pedestrian while being struck by an auto you [Berry-Pontiac-GMC, Inc.] don't own except:
>
> Any auto owned by that individual, his or her spouse, or by any family member of either.

It is the opinion of this court that the uninsured motorist coverage provided by this endorsement is the only uninsured motorist coverage available to Berry under the Aetna policy for injuries sustained while occupying a vehicle not owned by Berry-Pontiac. The "endorsement changes only those coverages listed

below for which a charge is shown below" and no charge is shown for uninsured motorist coverage. Berry did not reject uninsured motorist coverage in writing and, therefore, is entitled to statutory coverage only. See Miss. Code Ann. 83-11-101 (Supp. 1984). Additionally the extent of uninsured motorist coverage is ambiguous since paragraph B entitled "Changes in Auto Medical Payments and Uninsured Motorist Insurance" is not expressly conditioned on the payment ot uninsured motorist coverage premiums. This ambiguity in the policy language must be construed in favor of the insured and, for this reason also, Berry is entitled to statutory coverage. See GEICO v. Brown, 446 So. 2d 1002 (Miss. 1984.

In Allstate Insurance Company v. Randall, 81-4431, Fifth Circuit,

February 20, 1985, Allstate brought a declaratory judgment action to determine its duty to pay uninsured motorist coverage benefits to the daughter of an insured who was injured in an accident with an uninsured motorist when the policy excluded coverage to certain relatives of the insured. The insurance policy covered three vehicles for which separate premiums were paid. The parties agreed, pursuant to the holding of the Mississippi Supreme Court in State Farm Mutual Automobile Insurance Co. v. Nester, 459 So. 2d 793 (Miss. 1984), "that uninsured motorist coverage is available...because of the public policy dictates of the Safety Responsibility Act which override any contrary insurance policy language." Randall, slip op. at 2620. The Fifth Circuit allowed stacking of coverage, citing

GEICO v. Brown, 446 So. 2d 1002 (Miss. 1984): "[a]ny language attempting to limit an insurer's liability must fail when it deprives the insured of benefits for which a premium was paid." Id. at 1006. In this case, no premiums for uninsured motorist coverage applying to Berry while occupying an automobile not owned by Berry-Pontiac were paid. Accordingly, Randall is distinguishable on its facts.

It is, therefore, the opinion of this court that uninsured motorist coverage is available under the Aetna endorsement for Berry only in the minimum statutory amount and that stacking is not allowed. A judgment shall be submitted conforming to this memorandum opinion in accordance with the local rules.

This the 4th day of April, 1985.

TOM S. LEE, UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION
CIVIL ACTION NUMBER: J81-0553(L)

CHERRY BERRY, et al PLAINTIFFS

VS.

THE AETNA CASUALTY AND SURETY COMPANY and ROYAL GLOBE INSURANCE COMPANY DEFENDANTS

==========

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE

On November 14, 1981, H. H. "Jack" Berry received fatal injuries when the automobile in which he was riding was struck by an automobile being operated by Willie B. Davis, an uninsured motorist.

The Berry vehicle was owned by the Pontiac Motor Division of GMAC. At the time of the accident, it was being used by Berry and his wife, plaintiff here, with the permission of GMAC. Pontiac Motor Division had an insurance policy with defendant Royal Globe Insurance Company, which provided uninsured

motorist coverage to the occupants of the Royal Globe insured automobile.

Berry-Pontiac-GMC, Inc., of which Berry was an employee and stockholder, was the named insured of defendant Aetna Casualty and Surety Company's garage policy issued to the dealership. Based upon the value of the dealership inventory, this policy contained uninsured motorist coverage in the amount of $25,000, extended to eight vehicles of the dealership inventory.

Plaintiff, on behalf of the estate of H. H. Berry, H. H. Berry and his heirs at law, and on her own behalf, filed suit against Aetna and Royal Globe, contending that she was entitled to aggregate or "stack" uninsured motorist coverages provided by both companies. Defendant Aetna has moved for summary judgment, asserting that its

policy does not provide coverage for this accident. The Magistrate agrees.

The Aetna policy was issued to Berry-Pontiac-GMC, Inc., and carries the corporation as its named insured. Based upon inventory value of the dealership, uninsured motorist coverage was extended to eight dealership-owned automobiles. The Aetna policy contained a broadened coverage endorsement for named individuals who would be operating dealership-owned automobiles. Under this endorsement, H. H. Berry purchased extended liability and medical payments coverages for himself, but purchased no property damage or uninsured motorist coverage.

The Aetna garage policy extended uninsured motorist coverage only to operators of dealership owned automobiles. The automobile in which H. H. Berry was riding at the time of the accident was

owned by Pontiac Motor Division of GMAC. H. H. Berry was not the named insured under the Aetna policy and purchased no uninsured motorist coverage for himself; he, therefore, was not an insured under the terms of the Aetna policy. A corporate employee is not entitled to the status of the named insured when the named insured is a corporation. See, Hartford Accident and Indemnity Company v. Richdollar, 368 So.2d 603. (Fla. 1979).

The result is the same under the Mississippi Uninsured Motorist Act, §83-11-103 Mississippi Code of 1972 (Supp. 1984), which defines "insured" as (1) the named insured, (2) the spouse or relative of the named insured (while residing in the same household), or (3) a guest in "such motor vehicle to which the policy applies." Not being the named

insured under the Aetna policy or otherwise qualifying under the Mississippi Uninsured Motorist Act, and not having been in an automobile owned by Berry-Pontiac-GMC, Inc., at the time of the accident, Berry was neither a first class nor second class Aetna insured. He was uninsured.

For the above and foregoing reasons, the Magistrate respectfully recommends that Aetna's Motion for Summary Judgment be granted and that Aetna be dismissed as defendant in this cause.

RESPECTFULLY SUBMITTED,

Jackson, MS
Feb. 22, 1985

JOHN R. COUNTISS
UNITED STATES MAGISTRATE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NUMBER: 85-4318

MRS. CHERRY BERRY, ET AL.,

versus Plaintiffs-Appellants,

THE AETNA CASUALTY AND SURETY COMPANY and ROYAL GLOBE INSURANCE COMPANY, Defendants,

ROYAL GLOBE INSURANCE COMPANY,
Defendant-Appellee.

NUMBER: 85-4535

CHERRY BERRY, ET AL.,
Plaintiffs-Appellants,
Cross-Appellees

versus

THE AETNA CASUALTY AND SURETY COMPANY and ROYAL GLOBE INSURANCE COMPANY,
Defendants-Appellees
Cross-Appellants

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Appeal from the United States District Court for the Southern District of Mississippi

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(April 10, 1986)
Before CLARK, Chief Judge
JOLLY, and HILL, Circuit Judges

PER CURIAM:

AFFIRMED: See Local Rule 47.6.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NUMBER: 85-4318

MRS. CHERRY BERRY, ET AL.,
Plaintiffs-Appellants,

versus

THE AETNA CASUALTY AND SURETY COMPANY
and ROYAL GLOBE INSURANCE COMPANY
Defendants

ROYAL GLOBE INSURANCE COMPANY,
Defendant-Appellee

NUMBER: 85-4535

CHERRY BERRY, ET AL.,
Plaintiffs-Appellants,
Cross-Appellees

versus

THE AETNA CASUALTY AND SURETY COMPANY
and ROYAL GLOBE INSURANCE COMPANY
Defendants-Appellees
Cross-Appellants

ROYAL GLOBE INSURANCE COMPANY,
Defendant-Appellee

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Appeal from the United States District
Court for the Southern District
of Mississippi

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion 4/10/86, 5th Cir., 198_, _____F.2d_____)

(May 29, 1986)

Before CLARK, Chief Judge
JOLLY, and HILL, Circuit Judges

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in

regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

ENTERED FOR THE COURT:

Grady Jolly
United States Circuit Judge

REHG-8